No. 93-345

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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OCTOBER TERM, 1993

IN RE: MIDWAY PARTNERS, Debtor
a North Carolina Partnership
Tax I. D. Number 56-1535391

ERIC H. SCHEFFEY,

Petitioner,

V.

THE RESOLUTION TRUST CORPORATION,
Receiver for Heritage Federal Savings & Loan Association,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS ERR IN REVERSING THE DISTRICT COURT'S DECISION THAT HERITAGE HAD WAIVED ITS RIGHT TO APPEAL THE BANKRUPTCY COURT'S CONSOLIDATION OF HERITAGE'S CLAIMS INTO ONE OVERSECURED CLAIM?

TABLE OF CONTENTS[1]

Page

QUESTION PRESENTED FOR REVIEW..... 2

TABLE OF AUTHORITIES..... 7

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS.....10

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.....11

STATUTES AND RULES INVOLVED IN CASE.....12

Statutes:

11 U.S.C. §506

Rules:

Fed.R.Bankr.P 8001(a)
Fed.R.Bankr.P. 8002(a)

STATEMENT OF THE CASE.....17

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[1] Ocie F. Murray, Jr., Trustee for the Debtor Midway Partners, was a defendant/appellee in the proceedings in this case before the United States Court of Appeals for the Fourth Circuit. There are no parent companies or subsidiaries to be listed pursuant to Supreme Court Rule 29.1.

ARGUMENT.....27

HERITAGE[2] WAIVED ITS RIGHT TO APPEAL THE BANKRUPTCY COURT'S CONSOLIDATION OF HERITAGE'S CLAIMS INTO ONE OVERSECURED CLAIM.....27

A. The Fourth Circuit's Decision Impliedly, If Not Expressly, Conflicts With Other Decisions Of The Fourth Circuit And Other United States Courts of Appeal.....27

1. The Fourth Circuit's Decision Conflicts With Numerous Decisions Of The United States Courts Of Appeals, Including Fourth Circuit Panels, Which Have Held That

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[2] The Respondent, The Resolution Trust Corporation, as Receiver for Heritage Federal Savings and Loan Association, shall be referred to herein as "Heritage." The Trustee for the Debtor, Ocie F. Murray, Jr., shall be referred to herein as the "Trustee," and the Petitioner, Eric H. Scheffey, shall be referred to herein as the "Petitioner." The Debtor, Midway Partners, shall be referred to herein as the "Debtor" or "Midway Partners."

"Finality", For purposes of Determining The Timeliness Of Appellate Review, Is Considered In A More Pragmatic And Less Technical Way In Bankruptcy Cases Than In Other Situations.....27

2. The Fourth Circuit's Decision Conflicts With The Decisions Of Other Courts, Including The Fifth Circuit, That Judges May Change Their Decisions Until They Are Docketed.....33

B. Heritage Failed To Timely Appeal The Bankruptcy Court's Consolidation of Heritage's Claims Into One Oversecured Claim.....35

C. The Bankruptcy Court's May 3, 1990 Order Gave Clear Notice To Heritage That Its Claims Had Been Consolidated Into One Oversecured Claim.....37

D. Even if Heritage Did Not Waive Appellate Review of the Bankruptcy Court's Consolidation of its Two Claims by Failing to Appeal the Bankruptcy Court's May 3, 1990 Order, Heritage Waived Any Right It May Have Had to Seek Appellate Review of the Consolidation of its Two Claims as a Result of its Failure to Timely Appeal the Bankruptcy Court's January 2, 1991 Order Denying Heritage's Motion to Reconsider.....43

CONCLUSION.....47

TABLE OF AUTHORITIES

Cases — Page

A. H. Robins Co., Inc. v. Piccinin, 788 F.2d 994 (4th Cir. 1986).....28,30

Ackerman v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950).....42

Matter of Aldersgate Foundation, Inc., 62 B.R. 621 (Bankr. M.D. Fla. 1986).....41

American Precision Vibrator Company v. National Air Vibrator Company, 863 F.2d 428 (5th Cir. 1989).....33

Campbell v. Wells Mortgage & Investment, Inc., 48 B.R. 820 (Bankr. D. Col. 1985).....34

Matter of Colley, 814 F.2d 1008 (5th Cir.), pet. for rehearing denied, 818 F.2d 443 (5th Cir.), cert. denied, 484 U.S. 898, 108 S.Ct. 234, 98 L.Ed. 193 (1987).....30,41

Comm. of Dalkon Shield Claimants v. A. H. Robins Co., 828 F.2d 239 (4th Cir. 1987).....27,33

In re Amatex Corp., 755 F.2d 1034 (3rd Cir. 1985).....28

In re Branding Iron Steak House, 536 F.2d 299 (9th Cir. 1976).....36

In re Chinichian, 784 F.2d 1440 (9th Cir. 1986).....45

In re Franz, 97 B.R. 603 (Bankr. Kan. 1989).....37

In re Hospital General San Carlos, 83 B.R. 870 (Bankr. D.P.R.1988).....37

In re LBL Sports Center, 684 F.2d 410 (6th Cir. 1982).....36

In re Lionel Corp., 722 F.2d 1063 (2nd Cir. 1983).....46

In re Peacock, 125 B.R. 526 (Bankr. N.D. Ill. 1991).....36

In re Saco Local Development Corp., 711 F.2d 441 (1st Cir. 1983).....28,29

In re Topco, Inc., 894 F.2d 727, reh. denied, 902 F.2d 955 (5th Cir. 1990).....36

Smith v. Dairyman, Inc., 790 F.2d 1107 (4th Cir. 1986).....36

Vanston Bondholders Protective Committe v. Green, 329 U.S. 156, 67 S.Ct. 237, 91 L.Ed. 162 (1946)...45

Wolohan Lumber Co. v. Robbins, 21 B.R. 747 (Bankr. S.D. Ohio 1982).....45

FEDERAL STATUTES

11 U.S.C. §506(a).....12
11 U.S.C. §506(b).....38
28 U.S.C. §158(a).....25,26
28 U.S.C. §158(d).....26
28 U.S.C. §457.....25
28 U.S.C. §1254(1).....11
28 U.S.C. §1293(b).....28
28 U.S.C. §1334.....25
28 U.S.C. §2101.....11

FEDERAL RULES

Fed.R.Bank.P.Rule 8001.....13,27,35
Fed.R.Bank.P.Rule 8002.....passim

OTHER AUTHORITIES

1 Collier on Bankruptcy, ¶3.03
at 3-174 (15th ed. 1986 &
Supp. 1992).....37

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

1. Order and Opinion of United States Court of Appeals for the Fourth Circuit, Affirming in Part, and Reversing in Part, the September 11, 1992 Order of the District Court; decided June 1, 1993; 995 F.2d 490 (4th Cir. 1993).

2. Order of the United States District Court for the Eastern District of North Carolina, affirming the Bankruptcy Court's February 11, 1992 Order, filed September 11, 1992.

3. Order of the United States Bankruptcy Court for the Eastern District of North Carolina, Allowing Objections to Claims, filed February 11, 1992 ("Order 3").

4. Order Denying Motion to (1) Reconsider Adjudication of Claim and (2) Amend, Modify and Clarify Order, filed January 4, 1991 ("Order 2").

5. Order of the United States Bankruptcy Court for the Eastern District of North Carolina Denying Confirmation, Modifying Stay, and Converting Case to Chapter 7, filed May 3, 1990 ("Order 1").

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The opinion and judgment sought to be reviewed herein was entered by the United States Court of Appeals for the Fourth Circuit on June 1, 1993. The jurisdiction of this Court is invoked herein pursuant to, inter alia, 28 U.S.C. §1254(1), 28 U.S.C. §2101, et. seq., and Rules 10 through 16 of the Rules of the Supreme Court of the United States.

STATUTES AND RULES INVOLVED IN CASE

11 U.S.C. §506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any

hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

Fed.R.Bankr.P. Rule 8001. Manner of Taking Appeal; Voluntary Dismissal.

(a) Appeal as of right; how taken.

An appeal from a final judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. Failure of an

appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall conform substantially to the appropriate Official Form, shall contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their respective attorneys, and be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

Fed.R.Bankr.P. Rule 8002. Time for Filing Notice of Appeal.

(a) Ten-day period.

The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district

court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

STATEMENT OF THE CASE[3]

On February 12, 1988, the Debtor filed a chapter 11 bankruptcy petition. Heritage filed two proofs of claim with the bankruptcy court, one for $4,408,452.19 that arose in 1986 ("first claim"), and another for $399,156.56 that arose in 1987 ("second claim"). Each claim was secured by a deed of trust on the Collateral.[4] (App. 26-27).

On April 24, 1990, a confirmation hearing was held on the Debtor's plan. In its resulting May 3, 1990 order, the

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[3] All references to the Petitioner's Appendix to Petition for Writ of Certiorari will be noted parenthetically in the text and will be abbreviated "App. ____." Unless otherwise noted, all matters included in this statement of the case are set forth in the district court's September 11, 1992 order. (App. 25-46).

[4] As used herein the term "Collateral" shall mean and refer to the real property collateral securing Heritage's loans pursuant to its deeds of trust.

bankruptcy court (Hon. A. Thomas Small) denied confirmation of the plan and converted the case from chapter 11 to chapter 7. The order lifted the automatic stay and gave Heritage permission to pursue its remedies, including foreclosure. At the April 24, 1990 hearing the Debtor presented evidence that the value of the Collateral exceeded $9.5 million. However, the May 3, 1990 order valued the Collateral at $4,815,000, in accord with evidence presented by Heritage at the April 24 hearing. The bankruptcy court found that, at the time of the filing of the bankruptcy petition, the sum of Heritage's two claims was $4,807,608.75. The bankruptcy court treated this as one oversecured consolidated claim which accrued post-petition interest up to the value of the Collateral, $4,815,000. (App. 28).

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Heritage did not appeal the bankruptcy's court's consolidation of its claims.

Heritage held a foreclosure sale on August 24, 1990, four months after the April 24 valuation hearing. Heritage purchased the Collateral with a bid of $3,180,250. On November 14, 1990, Heritage filed a motion with the bankruptcy court to reconsider the adjudication of Heritage's claims and to amend, modify and clarify the bankruptcy court's May 3, 1990 order. The bankruptcy court held a hearing on this motion on December 19, 1990. Heritage asserted that the bankruptcy court erred by adding Heritage's two claims together and treating them as one oversecured claim which accrued post-petition interest up to the value of the Collateral. Instead, Heritage argued that its senior first claim alone should have accrued post-

petition interest up the value of the Collateral, leaving its junior second claim completely unsecured. In a January 2, 1991 order, the bankruptcy court rejected Heritage's argument and refused to modify the May 3 order. Heritage did not file an appeal from the bankruptcy court's refusal to reconsider its consolidation of Heritage's claims. (App. 28-29).

Meanwhile, on November 29, 1990, Heritage had also filed two amended proofs of claim. The first one amended Heritage's first secured claim and asserted an unsecured claim of $1,242,474.17 as a deficiency resulting from the foreclosure sale. The second amended proof of claim amended Heritage's second secured claim and asserted that the $399,156.56 claim was now completely unsecured because the proceeds of the

foreclosure sale were less than the amount of Heritage's first claim. (App. 29-30).

On December 4, 1991, the Trustee filed objections to Heritage's original and amended proofs of claim. At a February 4, 1992 hearing, Heritage argued that its amended claims should have been allowed because at the time of foreclosure in August, 1990, the Collateral was worth substantially less than $4,815,000. Heritage presented evidence attributing this decline in value to changes in federal wetlands regulations which affected the extent to which the Collateral could be developed as a real estate project. The Trustee and the Petitioner[5] asserted that Heritage's

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[5] The Trustee has filed a Complaint against the Petitioner in an Adversary Proceeding in which he alleges that the Petitioner is liable for the full amount of the Debtor's deficiency in this Bankruptcy Case.

amended proofs of claim should not be allowed because there was no competent evidence supporting a lower valuation of the Collateral. They urged the Court to find that the Collateral was worth $4,815,000 at the time of the foreclosure sale. (App. 30-31). The bankruptcy court allowed Heritage to present expert appraisal evidence in addition to the expert appraisal evidence that had been presented to the bankruptcy court by Heritage and the Debtor four months prior to the foreclosure sale. After hearing the additional evidence presented by Heritage, the bankruptcy court took the Trustee's objections to Heritage's amended proofs of claim under advisement.

In an order dated February 11, 1992, the bankruptcy court reviewed the evidence presented at the April 24, 1990 and December 4, 1991 hearings and found that

the Collateral was worth $4,815,000 at the time of foreclosure. Accordingly, the Order allowed the Trustee's objections to Heritage's amended proofs of claim. (App. 31-32).

Heritage appealed the February 11, 1992 Order to the district court. On September 11, 1992 the district court (Hon. Malcom J. Howard) determined that the bankruptcy court's findings of fact regarding the value of the Collateral were not clearly erroneous. In addition, after giving de novo review to the legal conclusions reached by the bankruptcy court in support of its valuation, the district court concluded that the bankruptcy court's decision was proper. Accordingly, the district court affirmed the bankruptcy court's February 11, 1992 Order. (App. 45). The district court expressly noted that it did not have

appellate jurisdiction over the bankruptcy court's consolidation of Heritage's two claims into one oversecured claim, and its refusal to reconsider or amend its decision to consolidate Heritage's claims, as set forth in the bankruptcy court's May 3, 1990 and January 2, 1991 Orders. (App. 33-34).

On Heritage's appeal to the Fourth Circuit, in a decision entered on June 1, 1993, the district court's September 11, 1992 order was affirmed in part and reversed in part. The Fourth Circuit concluded that the bankruptcy court was not clearly erroneous in determining the value of the collateral. However, the Fourth Circuit reversed the bankruptcy court's denial of the second claim on the grounds that neither the bankruptcy court's May 3, 1990 order nor January 2, 1991 order consolidated Heritage's two

claims into one consolidated claim. (App. 2-3).

The basis for the bankruptcy court's jurisdiction in this case was, inter alia, 28 U.S.C. §457 and 28 U.S.C. §1334. The basis for the subject matter jurisdiction of this case in the district court on appeal from the bankruptcy court was 28 U.S.C. §158(a), which provides that "[t]he district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees ... of bankruptcy judges." The bankruptcy court order purportedly appealed from (Order 3), denying allowance of Heritage's amended proofs of claim, was a final order. However, it is the Petitioner's position that Heritage actually sought and received appellate review by the Fourth Circuit of the bankruptcy court's rulings and other orders (Orders 1 and 2) from

which Heritage failed to timely appeal. The basis for jurisdiction in the Court of Appeals was 28 U.S.C. §158(d), which provides that "[t]he Courts of Appeal shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under [Section 158(a)]."

ARGUMENT

HERITAGE WAIVED ITS RIGHT TO APPEAL THE BANKRUPTCY COURT'S CONSOLIDATION OF HERITAGE'S CLAIMS INTO ONE OVERSECURED CLAIM.

A. The Fourth Circuit's Decision Impliedly, If Not Expressly, Conflicts With Other Decisions Of The Fourth Circuit And Other United States Courts of Appeal.

1. The Fourth Circuit's Decision Conflicts With Numerous Decisions Of The United States Courts Of Appeals, Including Fourth Circuit Panels, Which Have Held That "Finality", For Purposes of Determining The Timeliness Of Appellate Review, Is Considered In A More Pragmatic And Less Technical Way In Bankruptcy Cases Than In Other Situations.

The bankruptcy rules allow for an appeal as a matter of right from a final order of the bankruptcy court. Fed.R.Bankr.P.Rule 8001(a). "[C]onsiderations unique to bankruptcy appeals require that Courts consider 'finality in a more pragmatic and less technical way in bankruptcy cases than in other situations.'" Comm. of Dalkon

Shield Claimants v. A.H. Robins Co., 828 F.2d 239, 241 (4th Cir. 1987).

> [B]ankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory.

A. H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 1009 (4th Cir. 1986), citing In re Amatex Corp., 755 F.2d 1034, 1039 (3rd Cir. 1985). "[A] 'final judgment, order or decree' under 28 U.S.C. §1293(b) includes an order that conclusively determines a separable dispute over a creditor's claim or priority." In re Saco Local Development Corp., 711 F.2d 441, 445-46 (1983).

Both the bankruptcy court and the district court concluded that the RTC's

two claims had been consolidated into one secured claim pursuant to the bankruptcy court's May 3, 1990 order. The district court also properly concluded that Heritage had waived its right to seek appellate review of the consolidation of its claims as a result of its failure to timely appeal the May 3, 1990 order. In the alternative, the bankruptcy court and district court properly held that Heritage had waived its right of appeal when it failed to appeal the bankruptcy court's January 2, 1991 order denying Heritage's motion to reconsider the adjudication of its claims. As of January 2, 1991 the bankruptcy court had clearly and conclusively determined a separable dispute over a creditor's claim or priority - the consolidation of Heritage's claim. See In re Saco, 711 F.2d at 445-46.

To the extent that Heritage intended to seek appellate review of the bankruptcy court's consolidation of its claims, Heritage was required to file its notice of appeal within ten (10) days after the date of the order. Fed.R.Bankr.P. Rule 8002(a). Allowing appellate review of such orders without compliance with Rule 8002(a) will increase, rather than decrease," the waste of time and resources that might result from reviewing discrete portions of the action only after [the conclusion of proceedings in the bankruptcy court]." See A.H. Robins Co. v. Piccinin, 788 F.2d at 1009. The bankruptcy court's broad discretion to reconsider the allowance or disallowance of a claim "should not, however, encourage parties to avoid the usual rules for finality of contested matters." See Matter of Colley, 814 F.2d 1008, 1010 (5th

Cir.), pet. for rehearing denied, 818 F.2d 443 (5th Cir.), cert. denied, 484 U.S. 898, 108 S.Ct. 234, 98 L.Ed. 193 (1987).

The Fourth Circuit reversed the district court's decision on the grounds that the portions of the bankruptcy court's May 3, 1990 order related to the consolidation of Heritage's claims were "dicta." (App. 11). The Petitioner respectfully contends that even if the Fourth Circuit's reasoning were appropriate in non-bankruptcy cases, it is not appropriate in bankruptcy cases where such matters are not considered to be interlocutory dicta. On the contrary, it was necessary for the bankruptcy court to determine the secured status of Heritage's claims, in part, so that it could be determined whether or not Heritage could cast a vote concerning the acceptance or rejection of the Debtor's proposed

reorganization plan as a member of the unsecured class of creditors. The fact that another unsecured creditor (Talmark) voted to reject the plan does not affect the fact that the determination concerning the secured status of Heritage's claims was a necessary part of the bankruptcy court's rulings on the pending motions.

The Fourth Circuit's rationale is especially flawed with regard to the January 2, 1991 order (Order 2). By the very terms of this order the bankruptcy court specifically rejected Heritage's motion and request that the court reconsider its adjudication of its claims as one consolidated claim. Heritage's motion was denied; the Court's ruling was not "dicta." By its failure to appeal the January 2, 1991 order, Heritage waived its right to seek further appellate review even if finality were not considered "in a

more pragmatic and less technical way in bankruptcy cases than in other situations." See Comm. of Dalkon Shield. Claimants v. A. H. Robbins Co., 828 F.2d at 241.

2. The Fourth Circuit's Decision Conflicts With The Decisions Of Other Courts, Including The Fifth Circuit, That Judges May Change Their Decision Until They Are Docketed.

The Fourth Circuit emphasized in its opinion that certain statements made by Judge Small at the April 24, 1990 hearing were inconsistent with the rulings set forth in the bankruptcy court's May 3, 1990 order. (App. 5). However, it is well settled that, to the extent there is any inconsistency between any oral statements and a court's written rulings, as set forth in this case in the order subsequently docketed on May 3, 1990, the latter are controlling. See American Precision Vibrator Company v. National Air

Vibrator Company, 863 F.2d 428, 429 (5th Cir. 1989) ("judges may change their decisions until they are docketed"); see also Campbell v. Wells Mortgage & Investment, Inc., 48 B.R. 820 (Bankr. D. Col. 1985); Fed.R.Bankr.P.Rule 8002. The Petitioner respectfully contends that the Fourth Circuit's improper reliance upon statements made by Judge Small at the April 24, 1990 hearing contributed to its erroneous reversal of the district court and bankruptcy court decisions.[6]

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[6] The Fourth Circuit's opinion in this case also appears to contain an erroneous factual statement. With regard to Heritage having an unsecured claim of some amount, the Fourth Circuit's decision stated that "the appellees conceded this fact at oral argument." (App. 21-22). If this statement was meant to refer to the fact that the appellees agreed that, but for the consolidation of Heritage's two claims, Heritage would have an unsecured claim in some amount, then the statement is accurate. However, to the extent that the statement refers to the oral comments by the Debtor's attorney at the April 24, 1990 hearing, the Trustee had not yet been

B. Heritage Failed To Timely Appeal The Bankruptcy Court's Consolidation of Heritage's Claims into One Oversecured Claim.

Bankruptcy Rule 8001(a) provides in pertinent part that "[a]n appeal from a final judgment, order or decree of a bankruptcy court judge to a district court...shall be taken by filing a timely notice of appeal...within the time allowed by Rule 8002." 11 U.S.C.A. Rule 8001(a) (1984 & Supp. 1992). Rule 8002 requires that "[t]he notice of appeal shall be filed within ten days of the date of entry of judgment, order or decree appealed from." 11 U.S.C.A. Rule 8002(a) (emphasis

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appointed as of the hearing date, and the Debtor was not one of the appellees before the Fourth Circuit. It has been the position of the Trustee and the Petitioner throughout the proceedings in the bankruptcy court, and on appeal to the district court and Fourth Circuit, that Heritage has no unsecured claim as a result of the bankruptcy court's consolidation of Heritage's two claims into one consolidated claim.

supplied). The ten-day time period is strictly enforced. Failure to file a timely appeal deprives the appellate court of jurisdiction to hear an appeal, and any such appeal must be dismissed as untimely, absent excusable neglect.[7] Smith v. Dairyman, Inc., 790 F.2d 1107 (4th Cir. 1986) (absent exceptional circumstances only a party who files a notice of appeal properly invokes the jurisdiction of the appellate court); In re LBL Sports Center, 684 F.2d 410, 412 (6th Cir. 1982); In re Branding Iron Steak House, 536 F.2d 299, 300 (9th Cir. 1976); see also In re Topco, Inc., 894 F.2d 727, reh. denied, 902 F.2d 955 (5th Cir. 1990); In re Peacock, 125 B.R. 526 (Bankr. N.D. Ill.

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[7] Heritage has not requested leave to appeal the bankruptcy court's other orders, nor is there any evidence of excusable neglect which would allow it to do so.

1991); In re Franz, 97 B.R. 603 (Bankr. D. Kan. 1989); In re Hospital General San Carlos, 83 B.R. 870 (Bankr. D.P.R.1988); 1 Collier on Bankruptcy, ¶3.03 at 3-174 (15th ed. 1986 & Supp. 1992).

C. The Bankruptcy Court's May 3, 1990 Order Gave Clear Notice To Heritage That Its Claims Had Been Consolidated Into One Oversecured Claim.

The May 3, 1990 order provided as follows:

> Heritage actually filed two secured claims, one for $4,408,452.19 secured by a first lien on the project and a $399,156.56 claim secured by a second lien on the same property. For purposes of this opinion, the court shall refer to both Heritage claims as one claim secured by a first lien on the project.

(App. 56, n. 1).

For purposes of its opinion the bankruptcy court referred to Heritage's two claims as 'one claim secured by a first lien' rather than as 'two

consolidated claims secured by a first and second lien.' However, regardless of whether the bankruptcy court referred to Heritage's claims as 'one claim' or 'two consolidated claims,' the affect of the order was clearly to consolidate Heritage's two claims secured by the Collateral.

The bankruptcy court's consolidation of Heritage's claims is restated in another portion of the May 3, 1990 Order.

Heritage has no unsecured claim[4]

...

[4]Heritage contends that it has an unsecured claim, but that is not supported by the facts of this case. At the time of the petition, Heritage had a fully secured claim in the amount of $4,807,608.75. The value ($4,815,000) of the Heritage collateral exceeded the amount of its claim ($4,408,452.19 plus $399,156.56). Pursuant to § 506(b) interest continued to accrue on the secured claim until the amount of principal and interest equalled the value

> of the collateral ($4,815,000). At that point interest no longer accrued and Heritage had a secured claim of $4,815,000 and no unsecured claim.

(App. 63-64) (emphasis added).

Given the bankruptcy court's valuation of the Collateral, it was not possible for Heritage to have "no unsecured claim" unless the bankruptcy court had consolidated Heritage's two claims. In the event the two claims had not been consolidated on May 3, 1990, interest would have continued to accrue on Heritage's first claim until the total amount of principal and interest equalled the value of the Collateral, at which point Heritage's second claim would have been totally unsecured. Thus, the bankruptcy court clearly consolidated Heritage's two claims into one oversecured consolidated claim and Heritage cannot seriously contend that it was unaware that

the two claims had been consolidated. The Fourth Circuit's conclusion that the bankruptcy court's consolidation of Heritage's claims was merely dicta is clearly erroneous.

Heritage's explanation for its failure to appeal the consolidation of its claims is that the bankruptcy court had indicated in its order that the absence of any unsecured claim by Heritage (and, therefore, the consolidation of Heritage's two claims into one consolidated claim) was not 'significant' with regard to the motions then pending before the bankruptcy court. However, the 'significance' of the bankruptcy court's consolidation of Heritage's two claims is a determination that Heritage was responsible for making, and its decision not to appeal the consolidation of its two claims was a deliberate choice and a calculated risk.

See Matter of Colley, 814 F.2d 1008, 1010 (5th Cir.), pet. for rehearing denied, 818 F.2d 443 (5th Cir.), cert. denied, 484 U.S. 898, 108 S.Ct. 234, 98 L.Ed. 193 (1987). (The bankruptcy court's broad discretion to reconsider allowance or disallowance of claim "should not, however, encourage parties to avoid the usual rules for finality of contested matters"). Likewise, Heritage cannot contend that it did not receive adequate notice of the bankruptcy court's consolidation of its claims. Matter of Aldersgate Foundation, Inc., 62 B.R. 621 (Bankr. M.D. Fla. 1986) (appearance at hearing is waiver of any objection based on notice or opportunity to be heard).

This Court has repeatedly stated that a party must be diligent in seeking appellate review of any order which it believes to be in any way prejudicial to

its rights and interests. In Ackerman v. United States, this Court explained as follows:

> Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was the required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the [National League] case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

340 U.S. 193, 198, 71 S.Ct. 209, 212, 95 L.Ed. 207 (1950).

Heritage's calculated decision not to pursue an appeal of the bankruptcy court's consolidation of its claims cannot be excused simply because hindsight seems to indicate that its decision to forego an appeal was not wise.

D. Even if Heritage Did Not Waive Appellate Review of the Bankruptcy Court's Consolidation of its Two Claims by Failing to Appeal the Bankruptcy Court's May 3, 1990 Order, Heritage Waived Any Right It May Have Had to Seek Appellate Review of the Consolidation of its Two Claims as a Result of its Failure to Timely Appeal the Bankruptcy Court's January 2, 1991 Order Denying Heritage's Motion to Reconsider.

In its November 14, 1990 Motion to (1) Reconsider Adjudication of Claim and (2) Amend, Modify and Clarify Order (referred to herein as Heritage's "motion to reconsider adjudication of claim") Heritage argued to the bankruptcy court that its May 3, 1990 Order "includes an erroneous finding of fact" ... (App. 73), "[b]ased on a drafting error in the Order" (App. 74), and that "the Court mistakenly found that Heritage had no unsecured claim." (Id.). Heritage's motion concluded that

> [the Bankruptcy] Court's determination of the allowed amounts of Heritage's claims based on the first mortgage note

and the second mortgage note was incorrect [and that the] Court should enter an order adjudging that Heritage's allowed claims on the two notes are as follows:

(a) First Mortgage Note. Heritage holds an allowed secured claim in the amount of $4,815,000, which amount represents the indebtedness on the date of the bankruptcy petition ($4,408,452.19) plus post-petition interest limited by the value of The Cape; and

(b) Second Mortgage Note. Heritage holds an allowed unsecured claim in the amount of $399,156.56, the principal and interest owed on such note on the date of the debtor's bankruptcy petition.

(App. 82).

The bankruptcy court's firm belief that it made no mistake in consolidating Heritage's two claims,[8] and that it would

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[8] While the propriety of the bankruptcy court's consolidation order was not before the Fourth Circuit on appeal, and is not before this Court on this petition, it is the Petitioner's position

that the consolidation of Heritage's claims was proper and appropriate. Although post-petition interest on a senior lien generally accrues prior to the principal on a junior lien, the bankruptcy court does have discretion to limit the accrual of post-petition interest on a senior lien. See, e.g., Wolohan Lumber Co. v. Robbins, 21 B.R. 747 (S.D. Ohio 1982). In Wolohan, the bankruptcy court analyzed similar claims held by the debtor's primary and senior creditor, and treated a first and second lien on one parcel of the debtor's real property as a single lien for purposes of the trustee's sale, satisfaction of the lien and the accrual of post-petition interest. 21 B.R. at 751. The senior creditor had a first lien security interest ($93,000.00) on the debtor's farm, which was comprised of four parcels, and another security interest ($41,000.00) on only one of the four parcels. Id. 21 B.R. at 749, note 3. However, it appears that the bankruptcy court in Wolohan consolidated both of the above security interests in order to arrive at the total consolidated security interest on the farm in the amount of $135,683.00 as of the date of the debtor's petition filing. Id. 21 B.R. at 750. See gen. Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 163, 67 S.Ct. 237, 240, 91 L.Ed. 162 (1946). ("When and under what circumstances federal courts will allow interest on claims against debtor's estates being administered by them has long been decided by federal law."); In re Chinichian, 784 F.2d 1440, 1443 (9th Cir. 1986)

not reconsider, revise or amend the adjudication of Heritage's claims as set forth in the May 3, 1990 Order, was made perfectly clear in the bankruptcy court's January 2, 1991 Order:

> On May 3, 1990, the court entered an order in this chapter 11 case which denied confirmation of the debtor's plan, modified the stay and converted the case to chapter 7. In that order the court stated that Heritage had a secured claim of $4,815,000. Heritage contends that that statement was based on a mistake of fact and should be changed.
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> ...
>
> There are several reasons why these requests should be denied.
>
> ...
>
> Finally, the court is not convinced that a mistake was

(bankruptcy courts have equitable power to "look through form to the substance of a transaction and devise new remedies where those at law are inadequate."); In re Lionel Corp., 722 F.2d 1063 (2nd Cir. 1983) (same).

made. For any one of these reasons the motions are DENIED.

(App. 52-54).

CONCLUSION

For the reasons stated herein, the petitioner respectfully requests that the Court grant this Petition for Writ of Certiorari, and reverse the decision of the United States Court of Appeals for the Fourth Circuit to the extent that it reversed, in part, the decision of the United States District Court for the Eastern District of North Carolina, and the United States Bankruptcy Court for the Eastern District of North Carolina, with regard to Heritage's waiver of its right to appeal the bankruptcy court's consolidation of its claims.

This 27th day of August, 1993.

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